93-856

No.——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether identifying and determining the risks to be assumed under an insurance policy is the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

PARTIES IN THIS PROCEEDING

Pursuant to Rules 28.1 and 21.1, this petition is filed by five title insurance companies who were named as respondents in the Federal Trade Commission order reviewed by the Court of Appeals: Ticor Title Insurance Company, Chicago Title Insurance Company, Security Union Title Insurance Company (formerly known as SAFECO Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guaranty Company. Each of the petitioners is a corporation.

Petitioners *Ticor Title Insurance Company*, *Chicago Title Insurance Company* and *Security Union Title Insurance Company* are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of these petitioners has publicly traded common stock.

Petitioner *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of Lawyers Title Insurance Corporation has publicly traded common stock.

Petitioner *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation. Non-wholly-owned subsidiaries of Stewart Title Guaranty Company are listed in the Petition Appendix.

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PETITION FOR WRIT OF CERTIORARI

The petitioners are five title insurance companies named in an enforcement order of the Federal Trade Commission who sought review of that order by the United States Court of Appeals for the Third Circuit. Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Third Circuit in *Ticor Title Ins. Co. v. FTC*, No. 89-3787, entered July 15, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 998 F.2d 1129, and is reprinted in the Appendix to this Petition at 1a. The decision and order of the Federal Trade Commission (Pet. App. 37a) and the initial decision of the administrative law judge (Pet. App. 129a) are reported at 112 F.T.C. 344. The opinion of the Court of Appeals was on remand from the decision of this Court

in *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992), *reversing* 922 F.2d 1122 (3d Cir. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1993. Pet. App. 34a. A timely petition for rehearing was denied on August 30, 1993. Pet. App. 35a-36a. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The McCarran-Ferguson Act (the "McCarran Act") § 2(b), 15 U.S.C. § 1012(b), provides a federal antitrust exemption for the "business of insurance" where regulated by state law:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

STATEMENT OF THE CASE

This case concerns the activities of insurers and their agents in identifying and determining, prior to the issuance of an insurance policy, the scope of the risk to be assumed under the policy. A divided Court of Appeals held that this activity by the petitioning title insurers is not the "business of insurance" for purposes of the McCarran Act antitrust exemption.

The petitioners are engaged in the title insurance business throughout the United States. When they or their agents are requested to issue a title insurance policy in connection with a real estate transaction, by industry practice and state law they cause a title search and examination to be performed to determine the state of title to the property. The search and examination is intended to identify defects of title shown by the public land and other records. If title defects are disclosed by the search and examination, the title insurers' underwriting procedures require the defects to be cured prior to the issuance of the title insurance policy, or to be removed from the scope of the policy coverage. The title insurance policy when issued provides coverage against the risk of loss from title defects, whether or not discoverable from the land or other records, except for those defects specifically removed from the policy coverage as a result of the title search and examination.[1]

The charges paid by purchasers of title insurance policies are calculated to cover the expense of the search and examination. In each of the states at issue in this case, each petitioner for some period participated in a state licensed rating bureau through which proposed title insurance rates were jointly filed with state insurance regulators. In January 1985, the Commission initiated an enforcement action alleging that the petitioners had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), to the extent that these title insurance rating bureaus filed rates that covered expenses for search and examination. The title insurers raised a number of defenses, including the McCarran Act exemption and the state action doctrine.

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[1] The administrative law judge's description of search and examination and the issuance of title insurance (Pet. App. 138a-170a) was adopted by the Commission (Pet. App. 43a-44a).

The only issue to be determined for application of the McCarran Act exemption was whether the challenged conduct of the title insurers was the "business of insurance." Pet. App. 73a.[2] Although the Commission found that the title insurers' underwriting procedures were intended to make certain that the results of the title search and examination are "inevitably" reflected in the coverage provided under the title insurance policy, Pet. App. 80a-81a, it nonetheless rejected the title insurers' McCarran Act defense. The Commission issued an order requiring the title insurers in certain states to refrain from participating in licensed rating bureaus which file any rates covering their title search and examination activities, except under conditions establishing the elements of a defense under the state action doctrine. Pet. App. 38a.

The title insurers petitioned the United States Court of Appeals for the Third Circuit to review the FTC order on various grounds. On remand after prior decisions in the Third Circuit and this Court addressing state action issues, the Third Circuit for the first time addressed the title insurers' McCarran Act arguments.[3] By a 2-1 vote, the panel on remand held that the challenged activity was not the "business of insurance" within the meaning of the McCarran Act.

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[2] There was no allegation by the FTC that the title insurers' conduct was not regulated under state law within the meaning of McCarran Act § 2(b), or that the title insurers had participated in acts of boycott, coercion or intimidation so as to remove the exemption pursuant to McCarran Act § 3(b), 15 U.S.C. § 1013(b).

[3] The Third Circuit initially reversed the FTC's order without reaching the McCarran Act issue, on grounds that the challenged activities were protected by the state action doctrine. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991). The Commission sought certiorari with respect to four of the states at issue. This Court subsequently reversed the Third Circuit's state action ruling and remanded for further proceedings. *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992). On remand, the Third Circuit for the first time addressed respondents' McCarran Act defense as well as certain other issues which are not the subject of this petition.

The panel majority concluded that search and examination was not the "business of insurance" within the criteria established by this Court in *Union Labor Life Ins. Co. v. Pireno ("Pireno")*, 458 U.S. 119 (1982), and *Group Life & Health Ins. Co. v. Royal Drug ("Royal Drug")*, 440 U.S. 205 (1979).[4] The first *Pireno* criterion was not met, in the panel majority's view, because search and examination does not "itself" spread or transfer risk. (Pet. App. 11a) According to the panel majority, the persons who carry on these activities merely "identify defects of title," and "have no power to insure against any risk they identify." *Id.* In the panel's view it was only the "insurer's decision to cover . . . risks," not the risk identification activities themselves, that was the "business of insurance:"

> Ticor cannot claim that its title searchers determine the risk it agrees to underwrite any more than it could make a similar claim regarding the services provided, for example, by its secretarial staff or by a physician employed to report on the health of applicants for health or life insurance.

Id.

The panel held that the second and third *Pireno* criteria were not satisfied because the activity was not "peculiar to the insurance industry." Pet. App. 13a. It found that "[h]istorically, title search and examination services were provided by persons or entities separate from the issuer of the title insurance policy itself," and that "[e]ven today, entities other than title insurance companies provide title search and examination services." Pet. App. 11a.

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[4] In *Pireno*, this Court identified three criteria to be applied in determining whether a practice is the business of insurance under the McCarran Act: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129, summarizing *Royal Drug*. The Court stated that "[n]one of these criteria is necessarily determinative in itself." *Id.*

From this the panel concluded that the challenged practice was not "integrated into or encompassed within the relationship between the insurer and insured that flows from the policy" and was not "limited to entities within the insurance industry." Pet. App. 11a-12a.

The dissenting member of the Third Circuit panel, reaching the opposite conclusion, noted that the panel majority and the Commission did not dispute that search and examination is an "indispensable element" of the process of issuing a title insurance policy and that no title insurer issues a policy "without first performing such a search and examination." Pet. App. 29a. The dissenting judge concluded that "the sensible view [is] that a title search and examination performed as part of the process of issuing title insurance cannot be dissected from the rest of the policy-issuing process for the purpose of applying the McCarran-Ferguson Act." *Id.* In the dissent's view, the majority erred by construing the *Pireno* test to exclude pre-policy activities which "play an essential role in defining the risk that is transferred" (Pet. App. 30a, n.1) but which do not themselves transfer risk and which are not unique to the insurance business. The result, in his opinion, was inconsistent with the language, structure and legislative history of the McCarran Act:

> By its terms, Section 2(b) [of the McCarran Act] applies without any qualification relevant here, to the "business of insurance," and the "ordinary understanding of that phrase" (*Royal Drug Co.*, 440 U.S. at 211) certainly includes those preparatory and administrative activities that are an indispensable part of the issuance of insurance policies.

Pet. App. 30a. Noting that industry practice and state laws require that title insurance be issued only on the basis of a title search and examination, the dissent agreed with prior cases on the question, which hold that search and examination conducted for purposes of issuing a title

insurance policy is the "business of insurance" within the meaning of the McCarran Act.[5]

REASONS FOR GRANTING THE WRIT

The Third Circuit ruled that the "business of insurance" does not include the activities of identifying and determining the particular risks that will be assumed by title insurers under their insurance policies. The decision is contrary to the reasoning underlying the *Pireno* and *Royal Drug* decisions of this Court on which it purports to be based. It presents a direct conflict with decisions of the Tenth Circuit and other federal courts that, though they pre-date *Pireno* and *Royal Drug*, nonetheless correctly embody the essence of this Court's "business of insurance" analysis. The Third Circuit's reasoning broadly affects preparatory and administrative activities carried on in title insurance and other insurance lines as part of the process of determining what risks will be insured, and has implications well beyond the McCarran Act context. Because of the conflict with decisions of this Court and others, and the importance of the issue presented, the question is worthy of review by this Court.

1. By the McCarran Act, Congress acted to carve out one area of business activity—the "business of insurance" —where states have primary regulatory control. As part of that effort, it immunized the business of insurance, when it is state-regulated, from application of the federal antitrust laws. The question presented here is whether particular activities routinely conducted by title insurers as part of the process of issuing their policies—title search and examination—are part of the business of insurance. This question should not be difficult to answer. These

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[5] Pet. App. 29a, *citing Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 81 (10th Cir. 1973); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974); *McIlhenny v. American Title Ins. Co.*, 418 F. Supp. 364, 368-69 (E.D. Pa. 1976).

activities determine the risk that a title insurer assumes under its policies, and are at the heart of its business as an insurer. A legal analysis that leads to the opposite conclusion, like the one adopted by the Third Circuit in this case, deserves close scrutiny because it defies common sense and undermines the Congressional choice reflected in the McCarran Act.

The Third Circuit relied on two grounds to hold that the "business of insurance" does not include the title search and examination by which title insurers identify and determine the risks they assume under their policies. First, it found that this activity does not "itself" spread or transfer risk (Pet. App. 11a); second, it found that the activity is not "peculiar to the insurance industry," because it is performed by others in non-insurance contexts (Pet. App. 11a, 13a). As the dissenting panel member recognized, this analysis treats the activity generically, as if it were separate from the process of issuing an insurance policy. (Pet. App. 29a). The Third Circuit's analysis disregards the indispensable role these activities play in issuing the title insurance policy, and focuses on their similarity to activities carried on outside the insurance context that are not at issue in the case.

That the Third Circuit based its ruling on this Court's decision in *Union Labor Life Ins. Co. v. Pireno ("Pireno")*, 458 U.S. 119 (1982), (Pet. App. 11a-12a) demonstrates the need for clarification of the three-part *Pireno* analysis. The reasoning of *Pireno* does not contradict, but rather reinforces the title insurers' claim that their risk identification and determination activities are part of the "business of insurance."

a. The Third Circuit's insistence that an activity must "itself" spread or transfer risk to be considered the business of insurance is a fundamental misapplication of the first criterion of the *Pireno* analysis ("whether the practice has the effect of transferring or spreading a policyholder's risk," 458 U.S. at 129). In *Pireno* and in its

predecessor case *Group Life & Health Ins. Co. v. Royal Drug ("Royal Drug")*, 440 U.S. 205 (1979), this Court's analysis focused on the *relationship* between the practice in question and the transfer of risk effected by the insurance policy. It did not require that the practice *constitute* the risk transfer.

In *Pireno*, the challenged practice was a health insurer's use of a peer review board of physicians to determine whether charges for medical services were necessary and properly payable under the terms of its policies. This Court found that the peer review procedure was "logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies" because the procedure was used only after a claim was made under the policy; the peer review procedure did not determine the scope of the risk transferred under the policy, but only whether a claim fell within the range of risks already covered. 458 U.S. at 130-31. The same focus was applied in *Royal Drug*, which involved a challenge to a health insurer's agreements with pharmacies for the purchase of prescription drugs for policyholders. The pharmacy agreements had the same *ex post* relationship to the insurer's obligations under its policies as the peer review procedures in *Pireno*, and this Court refused to find a sufficiently close link to the transfer of risk effected by the insurance policies because "the [pharmacy] agreements . . . serve *only* to minimize the costs Blue Shield incurs in *fulfilling* its underwriting obligations." 440 U.S. at 213 (emphasis added).

In contrast to the practices at issue in *Pireno* and *Royal Drug*, title search and examination *precedes* the issuance of the title insurance policy and *determines* the scope of the risk transferred by the policy. As such, it is "logically and temporally . . . connected to the transfer of risk accomplished by [the] insurance policies" in precisely the fashion contemplated by those decisions. In *Pireno*, this Court reaffirmed that "the 'relationship between insurer

and insured, *the type of policy which could be issued*, its reliability, interpretation and enforcement [are] the core of the "business of insurance." '" 458 U.S. at 128 (emphasis added), quoting *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). "[T]he fundamental principle of insurance [is] that the insurance policy *defines the scope of risk* assumed by the insurer from the insured." *Pireno*, 458 U.S. at 131 (emphasis added).

The *Pireno* analysis recognizes that the "business of insurance" is not a single act but a process made up of various activities, which are tested under the first *Pireno* criterion by their relationship to the fundamental characteristic of insurance—the transfer and spreading of risk effected by the insurance policy. The Third Circuit misreads *Pireno* as requiring that an activity must "itself" spread or transfer risk to satisfy the first *Pireno* criterion. This appoach not only ignores the express reasoning of *Pireno* and *Royal Drug*, but narrows the first criterion to an extent that makes it virtually meaningless, since there arguably is no insurance activity (other than perhaps signing the policy) that "itself" transfers risks.

b. By focusing on title search and examination performed in non-insurance contexts, an activity not in issue in this case, the Third Circuit also misapplies the second and third *Pireno* criteria. Nothing in *Pireno* suggests that the analysis of a challenged insurance activity under these criteria depends on whether the same activity is presently performed or has been performed "historically" by other persons in non-insurance contexts.[6]

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[6] As early as 1932, long before Congress enacted the McCarran Act, this Court concluded that a title insurer's activities, including its search and examination preliminary to issuing its policies, were within the scope of the insurance business. *United States v. Home Title Ins. Co.*, 285 U.S. 191, 195 (1932). The historical record thus indicates what is still the case today—that title search and examination can be performed in either insurance or non-insurance contexts.

The second criterion of the *Pireno* analysis is "whether the practice is an integral part of the policy relationship between the insurer and the insured." 458 U.S. at 129. This criterion is satisfied here because, as the dissenting Third Circuit panel member recognized, "title searches and examinations occur before the title insurance contract is entered and play an essential role in defining the risk that is transferred." (Pet. App. 30a n.1). Because the challenged activity here is essential to defining the policy relationship between the insurer and the insured,[7] the Third Circuit's observation that "entities other than title insurance companies provide title search and examination services" (Pet. App. 11a) is irrelevant.

The third *Pireno* criterion is whether the challenged practice "is limited to entities within the insurance industry." 458 U.S. at 129. The Third Circuit concluded that the third criterion was not satisfied because "in many cases" title search and examination services are not "pro-

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[7] The Third Circuit suggests that the title search and examination is logically separate from the definition of the risk assumed by the insurer under the title insurance policy, asserting that it is only "the insurer's decision to cover the risks posed by the title searcher" that defines the policy coverage. (Pet. App. 11a). However, there is no record evidence or Commission finding to support the view that there is a separate decision-making step between the search and examination and the definition of coverage under the title insurance policy. On the contrary, the Commission found that title searchers and examiners exercise little or no discretion to provide insurance coverage except as disclosed by the results of the search and examination; it found that title insurers' standard forms and underwriting procedures are intended to make certain that the results of the title search and examination are "inevitably" reflected in the coverage provided under the title insurance policy. (Pet. App. 80a-81a). For this reason it is manifestly *not* true that "the title search and examination is 'a matter of indifference to the policyholder, whose only concern is whether his claim is paid'" (Pet. App. 16a, quoting *Pireno*, 458 U.S. at 132). Whether or not a claim is paid depends on the coverage provided under the policy, which in turn is determined directly by the results of the title search and examination.

vided or performed" by title insurance companies (Pet. App. 11a). This conclusion again disregards the limited character of the activity challenged by the FTC. The rating bureau rates challenged by the Commission were to be charged only by title insurers or their agents to purchasers of title insurance for title searches and examinations performed for title insurance purposes. Lawyers, abstractors and other non-insurance entities did not participate in the bureaus or subscribe to bureau rates, and there was no claim that the challenged practices extended to "approved attorneys, independent attorneys, abstractors, surveyors or anyone else besides [the insurers'] own agents and employees." (Pet. App. 220a n.286). While in some instances a title insurance policy may be issued on the basis of a search and examination performed by an unaffiliated abstractor or attorney, in every instance the role of the activity is to establish the scope of coverage of the title insurance policy.[8]

The analysis of *Royal Drug* and *Pireno* is not whether the practice at issue is "peculiar to the insurance industry." Had that been the inquiry, the resolution of those cases would have been simple because distributing prescription drugs and medical peer review obviously are not peculiarly insurance activities. Instead, this Court's more focused analysis examined the role of the activities in the insurance process. The role of the title search and examination activities here make them an indispensible part of the business of title insurance.[9]

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[8] The Third Circuit's focus on the identity of the person performing the search and examination is contrary to this Court's recent recognition "that 'the business of insurance' should be read to single out one activity from others, not to distinguish one entity from others." *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2901 (1993).

[9] The two recent decisions of the Court discussed by the Third Circuit (Pet. App. 14a, 18a) did not involve the sort of pre-policy risk evaluation activities at issue here, and do not support the result reached by the Third Circuit. *Hartford Fire Ins. Co. v.*

2. The Third Circuit's holding that the McCarran Act does not apply to title search and examination activities conducted for purposes of issuing a title insurance policy directly conflicts with the decision of the Tenth Circuit in *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973), and with a number of district court decisions. In *Commander Leasing*, the Tenth Circuit considered precisely the claims made by the FTC here: that the defendant title insurers had illegally fixed prices for their title insurance rates to the extent those rates included charges for title search and examination attendant to the issuance of title insurance policies. The court affirmed the dismissal of these claims on grounds that the setting of rates for such activities was protected by the McCarran Act. It rejected the attempt of the plaintiffs to characterize this activity as separate from the defendants' title insurance business, stating that "the business of title insurance cannot be . . . fragmented in the manner sought." 477 F.2d at 82. The Tenth Circuit expressly upheld the district court's determination that title search and examination was not a "separate business" but rather was a "condition precedent" to the issuance of title insurance policies and therefore was part of the "business of insurance." 477 F.2d at 81.

The other decisions addressing this issue have explicitly recognized the integral connection between the title search

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California, 113 S.Ct. 2891 (1993), reaffirms the time-honored proposition that it is the "business of insurance" that enjoys McCarran Act protection, not the "business of insurance companies." But McCarran Act protection is warranted here because of the character and role of the challenged activities as part of the insurance process, not because of the petitioners' identity as insurers. Nor is the Third Circuit's holding justified by the proposition for which it cites *United States Dept. of Treasury v. Fabe*, 113 S.Ct. 2202 (1993),—that McCarran Act protection is not warranted merely because a practice may have some indirect impact on an insurance company's status as a reliable insurer. The McCarran Act exemption here is not based on any attenuated link of this sort, but on the direct and substantial role of search and examination in title insurance underwriting.

and examination activities of title insurers and the issuance of a policy, and have confirmed that these activities come within the McCarran Act exemption. *Schwartz v. Commonwealth Land Title Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974) ("the title policy is issued only after an examination of the validity of the seller's title to his property . . . The investigation of the risk of loss prior to deciding whether to insure that risk is clearly part of the business of insurance. . . . [I]t would be in our view unrealistic, indeed ostrich-like, to separate the title search process from the pure insurance aspect of the title companies' activities and . . . to call only the latter 'the business of insurance' "); *McIlhenney v. American Title Ins. Co.*, 418 F. Supp. 364, 369 (E.D. Pa. 1976) (the obtaining of a mechanics' lien waiver and the issuing of a policy by a title insurer "are not simply ships which pass in the night but are engine and hull of the same vessel"). *Accord, In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,933 (E.D. Pa. 1986) ("title search and examination services . . . are part of the business of insurance [within the McCarran Act] since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies").[10]

By focusing on the role of search and examination as a "condition precedent" to the issuance of a title insurance

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[10] The importance of search and examination in determining the risk to be accepted under the title insurance policy distinguishes this case from *United States v. Title Ins. Rating Bureau of Arizona ("TIRBA")*, 700 F.2d 1247 (9th Cir.), *cert. denied*, 467 U.S. 1240 (1984), in which the Ninth Circuit ruled that the McCarran Act did not apply to escrow services performed by title insurers in real estate closings. That decision rested in significant part on a factual determination that "denies the centrality of the escrow process to the definition and acceptance of risk" under the title insurance policy. *Id.* at 1251. In its briefing below, the Commission itself acknowledged that search and examination "play a greater role . . . in determining the scope of the risk that is assumed" than the escrow services at issue in *TIRBA*. Brief for Respondent [FTC] at 23 n.25 (3d Cir., filed May 23, 1990).

policy, these pre-*Pireno* cases embody the essence of the *Pireno* analysis. Their recognition of the close relationship between search and examination and the underwriting of title insurance risk conforms precisely to the "logical and temporal" relationship to risk transfer required by this Court in *Pireno*. The Third Circuit's reliance on *Pireno* to disregard this conflicting authority (Pet. App. 10a-11a) merely emphasizes the need for review by this Court.

3. If unreviewed by this Court, the Third Circuit's decision will create uncertainty not only for title insurers but in virtually all lines of insurance. By insisting that every activity undertaken by an insurer, in order to constitute the business of insurance, must "itself" spread or transfer risk and must be "peculiar to the insurance industry," (Pet. App. 11a, 13a), the Third Circuit decision creates an unworkable test that renders the statutory definition virtually meaningless, and subjects to antitrust scrutiny many of the activities by which insurers carry on their business.

All insurers must engage in various preparatory and administrative activities, analogous to search and examination in title insurance, as part of the process of determining the risks that will be assumed when the insurance policy is issued. Though the extensiveness may vary, the underwriting process in all lines requires collecting information about the prospective insured and the risk to be insured. Expenses incurred for such activities are commonly considered by insurers in setting their premium rates, whether for regulatory or other purposes. They have never, until the Third Circuit's decision, been considered outside the business of insurance.

Under the Third Circuit's reasoning, however, these activities are not part of the business of insurance, no matter how central and important they may be to the determination of whether or on what terms to accept a risk, or to the process of issuing the insurance policy:

> Ticor cannot claim that its title searchers determine the risk it agrees to underwrite any more than it could make a similar claim regarding the services provided, for example, by its secretarial staff or by a physician employed to report on the health of applicants for health or life insurance.

Pet. App. 11a. Thus, under the Third Circuit's express reasoning, an insurer's medical examination of an insurance applicant and the typing of an insurance policy are not the business of insurance because they do not *themselves* transfer or spread risk, and because medical and secretarial services are not "peculiar to the insurance industry," being regularly performed outside the insurance context.[11]

That the Third Circuit's reasoning has implications for other insurance lines is demonstrated by the FTC's own decision in *In re Equifax Inc.*, 96 F.T.C. 844 (1980). Though the Commission now has repudiated its earlier and sounder analysis, in that case it held that the business of insurance included the activities of an independent consumer credit reporting agency in collecting medical information used by insurers to determine whether and on what terms to issue life or health insurance. According to the Commission in that case, the gathering of information that an insurance company "deems important to its determination whether to underwrite a risk . . . could *only* be viewed as the business of insurance." *Id.* at 1101 (emphasis added).[12]

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[11] The same is true of staff who perform statistical studies of the probability of loss from various risks. Such actuarial "services" clearly do not *themselves* transfer or spread risk, since a transfer of risk occurs not by the performance of actuarial studies but only by the "insurer's decision to cover or refuse to cover . . . risks" (Pet. App. 11a) and the embodiment of that decision in an issued insurance policy. Under the Third Circuit's interpretation of the *Pireno* test, therefore, even the actuarial staff of an insurance company would not be engaged in the business of insurance.

[12] In *Equifax* the Commission stated: "We agree . . . that the methods by which respondent collects information for insurers are

The Third Circuit's treatment of the "business of insurance" definition also has legal implications beyond the McCarran Act context. This Court has repeatedly used the McCarran Act "business of insurance" definition, and the three-part *Pireno* analysis, as a test to determine the scope of federal pre-emption effected by the ERISA statute.[13] *Pilot Life Ins. Co. v. Deadeaux*, 481 U.S. 41, 48-49 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-744 (1985). For this reason, the Third Circuit's interpretation excluding insurance risk definition activities from the "business of insurance" threatens not only the federal antitrust exemption for such activities provided by the McCarran Act, but also the ability of the States to regulate such activities in fields such as health, life or disability insurance which are provided pursuant to employee benefit plans.

The McCarran Act is a statutory expression of the will of Congress that the "business of insurance" be exempt from the Federal Trade Commission Act and other federal antitrust laws. While it is an axiom of construction that such exemptions are to be narrowly construed, the first objective of any court interpreting such a provision must be to carry out, not frustrate, the will of Congress. Any principled interpretation must not merely seek to narrow the scope of the exemption, but must anticipate that some meaningful range of conduct will fall within its scope; otherwise the act of Congress is reduced to a meaningless

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immunized from Section 5 [of the FTC Act] . . . to the extent the information is collected for use in connection with the underwriting or spreading of an insurance risk." 96 F.T.C. at 1099-1100. The Commission concluded: "The practices themselves must be the business of insurance in that they directly relate to the contract between the insurer and the insured and involve the underwriting or spreading of risk. . . . The gathering of information to be used in an underwriting or claim report is the business of insurance." *Id.* at 1102.

[13] Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*

gesture. Where, as here, the lack of principled analysis also has implications beyond the immediate context by determining the scope of federal pre-emption of state regulatory authority, the risk of harm from an erroneous precedent is especially strong. These considerations all strongly support the need for review by this Court.

CONCLUSION

The Court should grant the writ of certiorari to review the question presented.

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